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OFFICE OF PETITIONS

In re Application of :
Timothy Raymond Cronin : DECISION ON PETITION
Application No. 10/680,830 :
Filed: August 12, 2005 :
Title: CERTIFIED PROTECTION :
FROM SUBLIMINAL CONTENT FOR :
RECORDINGS :
:

This is in response to the communications filed September 9, October 4, and October 20, 2005 and October 6, 2006, requesting that the above-identified application be accorded a filing date of October 7, 2003. These communications are being treated as a petition under 1.10(e) to accord the application papers a filing date as of the date of deposit in Express Mail.

RELEVANT STATUTES, RULES AND REGULATIONS

35 U.S.C. 111(a) provides that:

The filing date of an application shall be the date on which the specification and any required drawing are received in the Patent and Trademark Office.

1.10(a) provides that:

(1) Any correspondence received by the U.S. Patent and Trademark Office (USPTO) that was delivered by the "Express Mail Post Office to Addressee" service of the United States Postal Service (USPS) will be considered filed with the USPTO on the date of deposit with the USPS.

(2) The date of deposit with USPS is shown by the "date in" on the "Express Mail" label or other official USPS notation. If the USPS deposit date cannot be determined, the correspondence will be accorded the USPTO receipt date as the filing date. See § 1.6(a).

The requirements of the statutes cannot be waived. Thus, the Office may only accord a filing date as of the date a specification (including at least one claim) and any required drawings are filed in the Office. If the requirements of rule 1.10 are met, the date of deposit with the USPS is considered the date of filing with the Office, if the requirements of the rule are met.

A review of the image file wrapper for this application reveals that a transmittal letter, specification and claims were filed on August 12, 2005. The image file wrapper is the Official record of the papers received in an application. Papers not present in the image file wrapper are not considered filed in the application. The image file wrapper does not contain any paper filed prior to August 12, 2005. In addition, on September 9, 2005, applicants advised the Office that drawings were "not applicable." Thus, if drawings are not required, pursuant to 35 U.S.C. 111, the earliest possible filing date for this application is August 12, 2005.

However, applicant contends that the application is entitled to a filing date of October 7, 2003. Applicant asserts that the application papers were originally deposited in the USPS Express Mail service on October 7, 2003. Applicant argues that the Office lost his application and that it was resubmitted on August 12, 2005. Applicant further states that a postcard was returned to him from the USPTO with the application number 10/680830. Yet, applicant's communications do not include a "true" copy of the application papers as originally filed, a copy of the Express Mail mailing label showing a date-in of October 7, 2003 or a copy of their return postcard.

Applicant's attention is directed to 1.10(e) and MPEP 503.

§ 1.10(e) provides that:

Any person mailing correspondence addressed as set out in

§ 1.1(a) to the Office with sufficient postage utilizing the "Express Mail Post Office to Addressee" service of the USPS but not received by the Office, may petition the Director to consider such correspondence filed in the Office on the USPS deposit date, provided that:

(1) The petition is filed promptly after the person becomes aware that the Office has no evidence of receipt of the correspondence;

(2) The number of the "Express Mail" mailing label was placed on the paper(s) or fee(s) that constitute the correspondence prior to the original mailing by "Express Mail";

(3) The petition includes a copy of the originally deposited paper(s) or fee(s) that constitute the correspondence showing the number of the "Express Mail" mailing label thereon, a copy of any returned postcard receipt, a copy of the "Express Mail" mailing label showing the "date-in," a copy of any other official notation by the USPS relied upon to show the date of deposit, and, if the requested filing date is a date other than the "date-in" on the "Express Mail" mailing label or other official notation entered by the USPS, a showing pursuant to paragraph (d)(3) of this section that the requested filing date was the date the correspondence was deposited in the "Express Mail Post Office to Addressee" service prior to the last scheduled pickup for that day; and

(4) The petition includes a statement which establishes, to the satisfaction of the Director, the original deposit of the correspondence and that the copies of the correspondence, the copy of the "Express Mail" mailing label, the copy of any returned postcard receipt, and any official notation entered by the USPS are true copies of the originally mailed correspondence, original "Express Mail" mailing label, returned postcard receipt, and official notation entered by the USPS.

(f) The Office may require additional evidence to determine if the correspondence was deposited as "Express Mail" with the USPS on the date in question.

MPEP 503 provides that:

A postcard receipt which itemizes and properly identifies the items which are being filed serves as prima facie evidence of receipt in the USPTO of all the items listed thereon on the date stamped thereon by the USPTO.

The identifying data on the postcard should be so complete as to clearly identify the item for which a receipt is requested. For example, the postcard should identify the applicant's name, application number (if known), confirmation number (if known), filing date, interference number, title of the invention, etc. The postcard should also identify the type of paper being filed, e.g., new application, affidavit, amendment, notice of appeal, appeal brief, drawings, fees, motions, supplemental oath or declaration, petition, etc., and the number of pages being submitted. If a new application is being filed, all parts of the application being submitted should be separately listed on the postcard, e.g., the number of pages of specification (including written description, claims and abstract), number of claims, number of sheets of drawings, number of pages of oath/declaration, number of pages of cover sheet (provisional application).

The postcard receipt will not serve as prima facie evidence of receipt of any item which is not adequately itemized on the postcard. For example, merely listing on the postcard "a complete application" or "patent application" will not serve as a proper receipt for each of the required components of an application (e.g., specification (including claims), drawings (if necessary), oath or declaration and the application filing fee) or missing portions (e.g., pages, sheets of drawings) of an application if one of the components or portion of a component is found to be missing by the USPTO. Each separate component should be specifically and properly itemized on the postcard. Furthermore, merely incorporating by reference in the postcard receipt, the items listed in a transmittal letter will not serve as prima facie evidence of receipt of those items.

Applicant must prove entitlement to a filing date of October 7, 2003. Given applicant's arguments, 2 ways of attempting to prove entitlement are available. First, applicant may seek to establish entitlement under 1.10(e) above. Such a petition must

include a copy of the application papers as applicant maintains they were originally filed on October 7, 2003 and a copy of the Express Mail mailing label (including the "date-in") used to mail the papers on October 7, 2003. Second, applicant may submit a copy of their itemized and date-stamped return postcard. It is suggested that applicant submit any and all evidence supporting a conclusion that the application is entitled to a filing date of October 7, 2003. Applicant is reminded, however, that evidence that a filing fee was filed on October 7, 2003 is not persuasive evidence that a specification and any required drawings were filed on that date.

Accordingly, the petition is dismissed without prejudice to reconsideration.

Applicant is given TWO (2) MONTHS from the mailing date of this decision to respond. This period is not extendable under 37 CFR 1.136(a).

Further correspondence with respect to this decision should be addressed as follows:

By mail: Mail Stop Petition
 Commissioner for Patents
 P.O. Box 1450
 Alexandria, VA 22313-1450

By hand: Customer Service Window
 Randolph Building
 401 Dulany Street
 Alexandria, VA 22314

Telephone inquiries specific to this decision should be directed to the undersigned at (571) 272-3219.


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